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Private Law: Torts

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Article 4701 of the Code of Civil Procedure was designed to clarify the problem of notice in support of summary ejectment proceedings. In *Maxwell, Inc. v. Mack Trucks, Inc.*,⁷⁸ the court held that only a five-day period of notice is required in the case of a lease having a definite term. This holding appears to be entirely in accord with the intention of the draftsmen.

TORTS

*Wex S. Malone**

The Louisiana appellate courts handed down several hundred torts cases during the past term. Any attempt to select a manageable group of decisions for discussion can prove to be embarrassing as well as difficult for the reviewer. As I reread the pages that follow I am struck by the unseemly critical tone of many of my comments. But the reason for this is fairly obvious. The bulk of the cases, which are clear and sound, escape discussion for the very reason that they *are* well decided and present issues upon which the Louisiana law may be regarded as fairly well settled. Spectators do not throw pop bottles at the umpire until he calls a close one.

DUTY

The recently decided case, *Lee v. Peerless Ins. Co.*,¹ presents a picture that is attracting increased attention throughout the nation. Lee, the deceased, following a few social drinks, drove at night to Sak's Lounge, defendant's insured, a bar located on congested Highway 80 in Bossier City. The petition alleged that the deceased was continuously coaxed to drink by Sak's waitresses, who were employed for the purpose of encouraging customers, until he had consumed "thirty-forty drinks," had grown helpless, and had fallen a number of times to the knowledge of all present. The establishment was closed several hours after midnight and deceased was required to leave the premises by employees who were aware of the danger involved in his exposure to the traffic of the four-lane transcontinental high-

78. 172 So.2d 297 (La. App. 4th Cir. 1965). Writ refused.

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1. 175 So.2d 381 (La. App. 2d Cir. 1965).

way. He was killed almost immediately thereafter while out in this road in his helplessly intoxicated condition. The petition for damages for wrongful death was dismissed by the court of appeal on an exception of no cause of action.

The sole basis of the defendant's exception was the contributory negligence of the deceased as shown on the face of the petition. Hence the court was restricted in its attack on the controversy. Strangely, there was no mention of the doctrine of last clear chance in the opinion. It seems, however, to this writer that the facts presented clearly a last chance situation under accepted Louisiana law. Lee's negligence in becoming intoxicated, although reprehensible, had nevertheless placed him in a condition of obvious helplessness, and his imminent peril was fully appreciated by the defendants, who thereafter had the opportunity and facilities for preventing the tragedy.² Furthermore, the defendant's deliberate exclusion of the helpless plaintiff, exposing him to the obvious risk of an injury or death in traffic might well be regarded as willful and wanton misconduct, thus excluding the defense of contributory negligence.

If the defense of contributory negligence were obviated, there still would remain the question as to what duty the proprietor owed with reference to the safety of his drunken patron. If the usual American position were adopted, recovery could not be based solely on the fact that the defendant was negligent in selling whiskey to an obviously intoxicated person who might foreseeably injure himself or others if he were encouraged to consume more liquor. It is generally said that in such situations the wrongful sale of intoxicants is not the "proximate cause" of any injury in traffic that flows from the continued excessive drinking.³ Perhaps it is felt that the accident cost is too high to be borne by the liquor traffic or that the varied

2. *Rottman v. Beverly*, 183 La. 947, 165 So. 153 (1935). This same position was restated and applied recently in *Evans v. Thorpe*, 175 So. 2d 418 (La. App. 2d Cir. 1965); *Coleman v. Mason*, 174 So. 2d 655 (La. App. 3d Cir. 1965). Although the last clear chance doctrine finds its most frequent application in traffic situations, there is no sound reason why it should not be applied to other accidents.

3. *State v. Hatfield*, 197 Md. 249, 78 A.2d 754 (1951). Comment, 20 LA. L. REV. 800 (1960). Even under this view it is arguable that recovery should be allowed in *Lee's* case. This was not merely an incident of "sale" to an intoxicated patron. The defendant employed bar girls whose job was to increase profits by urging customers to drink (even beyond their capacity). Conceding that sound policy would be served by protecting the ordinary seller of liquor from the ruinous costs of traffic risks flowing from excessive drinking, it does not follow that the same kind of protection should shield those sellers who follow the practices charged against Sak's Lounge.

circumstances may prove to be too difficult to administer in the courtroom. Therefore, any change must come by way of legislation, and some states have enacted statutes conferring a civil action against sellers of intoxicating liquor subject to various restrictions.⁴

The *Lee* case, however, differs substantially from the usual situation where the seller of intoxicants is sued unsuccessfully for injuries suffered by the drunken purchaser or by third persons. Lee was "turned out" or "required to leave" the premises while he was disabled under circumstances where his danger was imminent and obvious.⁵ If an ill patron were ordered out of business premises under such circumstances that it were obvious to the proprietor that his exclusion involved a substantial risk of injury or death, recovery would be expected. This much duty is owed even to a trespasser. Just as the defendant may not kill a trespasser to eject him, he will not be privileged to put him out when he will be exposed to the danger of serious physical harm.⁶

Emotional Disturbance

The right to recover for the physical consequences of severe emotional distress brought about by defendant's negligence has been the subject of considerable discussion in Louisiana and elsewhere for several decades. The situation on shock and fright in this state has been ably discussed in this *Review* and need not be further elaborated here.⁷ The most controversial area today centers around the situation where one member of a family witnesses or otherwise learns of the death or injury of another family member and thereupon suffers shock so severe as to cause death or physical injury. Under these circumstances, is the negligent defendant who was responsible for the original accident to be made liable also for the second injury? Almost without exception, courts everywhere have given a negative answer to this question. By and large the Louisiana courts have adopted the majority position. The clearest and most recent decision in *LaPlace v. Minks*.⁸ In this case the plaintiff's child was killed through the alleged negligent driving of the defendant.

4. Comment, 20 LA. L. REV. 800, 802 (1960).

5. *Depue v. Flateau*, 100 Minn. 299, 111 N.W. 1 (1907). See also cases cited in PROSSER, TORTS 399, n.71 (3d ed. 1964).

6. PROSSER, TORTS 399, n.71, 117 (3d ed. 1964).

7. Note, 23 LA. L. REV. 473 (1963).

8. 174 So.2d 895 (La. App. 1st Cir. 1965).

Upon learning of the tragedy the plaintiff suffered a severe and disabling heart attack for which he sought damages. Recovery was denied in a clear and well-reasoned opinion. This decision deserves careful comparison with the earlier case, *Holland v. St. Paul Mercury Ins. Co.*,⁹ which has been noted in this *Review*.¹⁰

A less dramatic but equally interesting decision dealing with the physical consequences of emotional shock brought about by negligence is *Brouillette v. City Bldg. Supply Co.*¹¹ Plaintiff, an elderly man, was proceeding down the public sidewalk and had reached a point about opposite the center of an adjacent parking lot. In the street the defendant's truck was preparing to turn left so as to cross the sidewalk and enter the lot. The driver, observing that plaintiff was obstructing his intended path, blew his horn and screeched his brakes. This so frightened the aged man that he fell while attempting to get out of the way and suffered the injuries complained of. Recovery was affirmed by the court of appeal. It is well settled that one who drives so negligently as to expose another person to an unreasonable risk of being struck by the vehicle cannot escape liability even if by chance impact is avoided but the fright occasioned by the occurrence causes the victim to fall or otherwise injure himself in his attempt to escape. Under these circumstances, the defendant, who has threatened the physical safety of the other, cannot complain that the injury came about in an unexpected manner.¹² Perhaps the facts of the *Brouillette* case bring it within the above observations. On the other hand, it appears not unlikely that the defendant's driving did not place the plaintiff in any actual danger of being struck. If this version is correct, the defendant's only wrongdoing was his conduct in exciting an obviously feeble and unstable person into a real but unfounded fear that he was placed in danger. However, even under these circumstances an imposition of liability is proper whenever the defendant has reason to anticipate that the excitement he deliberately engenders is likely to result in precipitate action that could cause a fall or other mishap.¹³

9. 135 So. 2d 145 (La. App. 1st Cir. 1961).

10. Note, 23 LA. L. REV. 473 (1963).

11. 174 So. 2d 658 (La. App. 3d Cir. 1965).

12. RESTATEMENT, TORTS § 436(2) (2d ed. 1965).

13. *Id.* §§ 312, 436(1).

DISPUTES BETWEEN ADJOINING LANDOWNERS—
SOVEREIGN IMMUNITY IN TORT

This writer has maintained on several occasions that a controversy does not lose its character as a torts dispute merely because the plaintiff invokes article 667 of the Civil Code,¹⁴ which appears in the division of the Code devoted to servitudes.¹⁵ A contrary opinion has been ably expressed by others,¹⁶ and the decisions themselves had left the answer in some doubt. The implications of this dispute were suggested recently in a novel context. Plaintiff's property was injured allegedly by vibrations resulting from pile-driving conducted by a contractor in a public highway under direction of the state. The plaintiff, in its attempt to meet the Highway Department's interposition of the defense of sovereign immunity from tort liability, maintained that the claim was asserted under article 667 and hence did not involve tort liability. The court of appeal rejected this contention with the observation that a political body is neither an "owner," as contemplated by the article, nor was it a "neighbor."¹⁷ The state's sovereign immunity thus remains, but it is doubtful that either side of the property-versus-torts dispute can gain much consolation from the decision. The court, by excluding the claim from the provisions of article 667, avoided committing itself on the nature of the liability imposed by that article.

However, in another decision, *Gulf Ins. Co. v. Employers Liab. Assur. Corp.*,¹⁸ the court of appeal did face head-on the problem of the nature of article 667 liability. The problem involved was one of prescription: Should a controversy based upon this article be prescribed in one year, as other torts claims are prescribed, or should it be governed by the ten-year period of limitation that controls in suits brought upon contract? The court, in characterizing the claim as one grounded in tort,

14. "Although a proprietor may do with his estate whatever he pleases, still he can not make any work on it, which may deprive his neighbor of the liberty of enjoying his own, or which may be the cause of any damage to him."

15. Malone, *The Work of the Louisiana Supreme Court for the 1946-1947 Term—Torts and Workmen's Compensation*, 8 LA. L. REV. 248 (1948); Malone, *The Work of the Louisiana Supreme Court for the 1956-1957 Term*, 18 LA. L. REV. 62 (1957). To the same effect, see Campbell, *The Work of the Louisiana Supreme Court for the 1954-1955 Term*, 16 LA. L. REV. 267 (1956).

16. Dainow, *The Work of the Louisiana Supreme Court for the 1946-1947 Term—Property*, 8 LA. L. REV. 234, 237 (1948).

17. *Klein v. Louisiana Dep't Highways*, 175 So.2d 454 (La. App. 4th Cir. 1965).

18. 170 So.2d 125 (La. App. 4th Cir. 1965).

observed that liability under article 667 is in effect a species of "fault" liability as envisioned by article 2315 of the Civil Code even though there may be no necessity to establish negligence, intent to injure, or "unlawful" conduct.

Decisions such as the above do little more than pave the way for an answer to the more fundamental inquiry that must ultimately be faced by the Louisiana courts: Is article 667 to be taken at its literal face value as an arbitrary pronouncement that landowners are subject to unqualified liability for *any* work done upon their land that happens to injure a "neighbor"? Is there some fatal magic in land ownership that calls for a radical shift in the spectrum of liability and ignores the normal requirement that losses are to be shifted only upon the shoulders of the blameworthy? Is it sufficient in reply to merely point out that this is what the Code "says"?

When this inquiry is ultimately brought before the Supreme Court for sharp and direct consideration, the following observations may be of some assistance: (1) article 667 does not represent any heritage from the French Civil Code; no counterpart of the provision is found in that document; (2) the adage expressed in the article does have its direct counterpart in the ancient common law maxim, *sic utere tuo ut alienum non laedas* (one cannot use one's own so as to injure one's neighbor);¹⁹ (3) the common law maxim was abandoned more than a century ago, and in its place there was substituted the doctrine of unqualified liability for damage done during the course of *ultrahazardous* activities (originally referred to as the rule of *Rylands v. Fletcher*).²⁰ This latter doctrine refers absolute liability, not to land ownership, but to the act of engaging in specific activities which involve a foreseeably high risk of injury to neighbors even when conducted with the utmost care (including blasting, impounding large quantities of water, spraying chemicals from the air, and the like).²¹ The benefit of the doctrine

19. See the discussion in PROSSER, TORTS § 74 (3d ed. 1964).

20. [1868] L.R. 3 W.L. 330.

21. Perhaps the most commonly accepted statement of the doctrine is in the RESTATEMENT, TORTS §§ 519, 520 (1938):

"§ 519. Misconduct of Ultrahazardous Activities Carefully Carried On.

"Except as stated in §§ 521-4, one who carries on an ultrahazardous activity is liable to another whose person, land or chattels the actor should recognize as likely to be harmed by the unpreventable miscarriage of the activity for harm resulting thereto from that which makes the activity ultrahazardous, although the utmost care is exercised to prevent the harm."

"§ 520. Definition of Ultrahazardous Activity."

is thus available against all who engage in such an activity, and this includes contractors. Thus the doctrine of ultra-hazardous liability is a modern formula based upon sound notions of insurability and risk distribution.²² This can hardly be said in favor of a literal interpretation of article 667 of the Civil Code whose barb is directed solely at the conduct of the landowner on his own land, irrespective of the nature of the risk which he created.

Although the Louisiana courts have paid lip service to a literal acceptance of article 667 on several occasions, it is significant that in *every* instance where this has occurred there either was involved an ultra-hazardous activity that would have called for strict liability under the commonly accepted doctrine of ultra-hazardous activities, or there existed a private *nuisance* (which represents an area of liability all its own, and which is by no means foreign to prevalent notions of fault).²³ Finally, liability for the spread of fire has always been imposed by Louisiana courts entirely in terms of negligence and fault, although fire-spread falls within the strict letter of article 667 in every respect.²⁴ In other American jurisdictions liability for fire is almost universally excluded from the doctrine of strict liability resulting from ultra-hazardous activities.

The recent *Gulf Ins. Co.* decision, which explains article 667 as imposing a species of fault liability analogous to the liability encompassed by article 2315, seems to this writer to

"An activity is ultrahazardous if it:

"(a) necessarily involves a risk of serious harm to the person, land or chattels of others which cannot be eliminated by the exercise of the utmost care, and

"(b) is not a matter of common usage."

Discussions of the doctrine include: PROSSER, *TORTS* § 77 (3d ed. 1964); 2 HARPER & JAMES, *TORTS* §§ 14.1-14.8 (1956).

22. In America the doctrine is not restricted to activities that take place on land. See 2 HARPER & JAMES, *TORTS* § 14.5, at 805. It will be noted from the statement of the doctrine in the *RESTATEMENT, TORTS*, § 520(b) (1938), quoted in note 21 *supra*, that the activity must be one that is not in common usage. Hence, injuries inflicted by the operation of automobiles and ordinary industrial machinery, for example, are excluded, and negligence must be shown.

23. The only meaningful characteristic that distinguishes the "nuisance" from other types of liability is that the nuisance involves an interference with use and enjoyment of land, as opposed to a physical invasion of property, as in trespass. It is not a "type" of liability, and it may rest either on negligence, intention, or upon principles of ultra-hazardous activity. Prosser observes that in nuisance cases "the court must make a comparative evaluation of the conflicting interests according to objective legal standards, and the gravity of the harm to the plaintiff must be balanced against the utility of the defendant's conduct." PROSSER, *TORTS* § 90, at 617 (3d ed. 1964).

24. Comment, *Railroad Liability for Fires in Louisiana*, 15 *LA. L. REV.* 163 (1954).

point the way toward a rational approach to the true significance of article 667. The same considerations that go into the familiar fault approach of article 2315 should appropriately play a part also in controversies under article 667. One who (as owner, contractor, or otherwise) engages in a hazardous activity on land that involves a substantial risk of injury to others even when the activity is conducted with all possible care should properly be made to answer for the consequences. If, with eyes open to the high possibility of damage involved, any person seeks to reap the benefit of blasting, oil production and similar activities, he should pay the cost of damage resulting therefrom. Such conduct can appropriately be classified as "fault," even though it is not to be condemned morally or socially.²⁵ But it is important to notice that the emphasis should rest upon the highly dangerous character of the land-developing activity involved, and not upon the mere fact that the defendant happened to be a landowner who was doing something in the way of developing or utilizing his property. Similarly, the benefits of absolute liability should extend to suits against contractors and all others who choose, for their own profit, to conduct an activity that involves a high degree of danger to those within the foreseeable area of danger. An acceptance by our courts of the hazardous-activity rationale, suggested above, would involve no contradiction of the results reached in prior Louisiana decisions.

ASSAULTS—AGGRESSOR DOCTRINE

Two recent decisions afford further evidence of the deterioration of the so-called "aggressor" doctrine that has plagued Louisiana law in past years. In the first of these cases, *Baughman v. Wells*,²⁶ the court ruled that the doctrine cannot be used to justify an assault prompted by insulting remarks after the assaulting defendant has had a reasonable opportunity to "cool off." The opinion indicates that the provoking words must have been uttered immediately preceding the attack. The other decision, *Rivers v. Brown*,²⁷ affirmed and followed a position

25. An interesting development of this thesis will be found in Stone, *Tort Doctrine in Louisiana: The Materials for the Decision of a Case*, 17 TUL. L. REV. 159, 207-15 (1942). Professor Stone's observations were influential in the decision in the instant case, *Gulf Ins. Co. v. Employer's Liab. Assur. Corp.*, 170 So. 2d 125 (La. App. 4th Cir. 1965).

26. 171 So. 2d 759 (La. App. 2d Cir. 1965).

27. 168 So. 2d 400 (La. App. 3d Cir. 1964).

announced in Louisiana earlier²⁸ to the effect that the defendant may lose the benefit of the aggressor doctrine if he uses "excessive force." The opinion observed that excessive force is force "beyond what is reasonably required under the circumstances of the case."

The term "excessive force" has a peculiar ring when used in association with the aggressor doctrine. The phrase can be readily understood when it is employed in connection with common defenses such as self-defense, defense of another, or defense of property. In such cases the assaulting defendant is privileged to use force as a means of attaining some socially desirable end—the protection of person or property. The force must be limited to such as appears reasonably necessary to achieve the purpose for which the defense was given, and anything more is excessive and beyond the protection of the privilege. The aggressor doctrine, on the other hand, is not geared to the attainment of any recognizable social objective. It is a mere recognition of hot temper aroused by provocation—a toleration by government of the attitude of the frontiersman. When the notion of excessive force is incorporated into this doctrine, the result can be only to invite the court's personal estimate as to how vigorously a defendant should be permitted to reply in violence to a given insult. In a close case this must be difficult business for a conscientious judge, although it is obvious that some such modifier must be available to the courts if the aggressor doctrine is to be kept within manageable bounds. This writer would be happy if the entire aggressor doctrine were shelved in some museum of archaic legalisms. Gross insults and violations of privacy are now actionable torts everywhere, and the aggrieved person should seek his redress in the courtroom rather than in gladiatorial combat.

DUTY AND CAUSE-IN-FACT

The recent decision, *Lee v. Carwile*,²⁹ points up the close interrelationship of duty and cause-in-fact. Plaintiff, a roomer in defendant's boarding house, was injured when the house was destroyed by fire during the night. The only alleged neglect of the defendant was its failure to provide exterior fire escapes of the type of construction required by statute. Specifically,

28. *Landry v. Gilger Drilling Co.*, 92 So. 2d 482 (La. App. 1st Cir. 1957).

29. 168 So. 2d 469 (La. App. 3d Cir. 1964).

wood ladders only were provided, while the statute required the installation of exterior stairs with railings and with a designated angle of descent.³⁰ Plaintiff was asleep in a rear bedroom on the second floor. He could not reach the rear exit because of the flames, and passage to the front exit was made so hazardous by the presence of smoke that plaintiff did not attempt to approach it from down the hallway. Instead he leaped from his own bedroom window and sustained the injuries for which he sued. The decision, denying recovery, is couched chiefly in terms of cause-in-fact. The court emphasized that even if defendant had complied with the statute, the plaintiff would have been unable to reach the front escape owing to the smoke hazard in the hallway.

The opinion referred to the rule laid down by the Supreme Court in *Dotson v. Louisiana Cent. Lumber Co.*³¹ to the effect that when it is shown that defendant violated some statutory safety regulation the burden shifts to defendant to show that the violation was not a proximate cause of the damage to plaintiff. Even so, observed the court in the instant decision, the evidence taken as a whole makes it clear that plaintiff could not avail himself of the escapes provided.

This decision is called to the reader's attention, not because it is believed to be erroneous nor even because the language of cause-in-fact was entirely inappropriate, but in order to point out the close affinity between inquiries of duty and those of causation. It is important to bear in mind that the defendant was not chargeable with a failure to provide a sufficient number of exterior escapes, nor was it charged with neglecting to install these at locations prescribed by law. This is abundantly clear from the opinion.³² The only contention of plaintiff was that the exits were ladders, while the statute required stairways with handrails and with a specified maximum angle of descent. It follows that the only risks encompassed by the provision violated were the risks of falling or sustaining other injury attributable to a sharp descent or to the unavailability of arm support. Plaintiff did not encounter any such risk, because he failed to reach the exits for reasons not attributable to defendant. Plaintiff did attempt unsuccessfully to show that he would have

30. LA. R.S. 40:1585 (1950), as amended La. Acts 1952, No. 340, § 9.

31. 144 La. 78, 80 So. 205 (1918).

32. 168 So. 2d at 475.

gone to the front and used the fire escape there if he had not feared that its structure was unsafe. If this contention had been supported by the evidence, he would probably have brought his injury within the range of risks protected by the provision that defendant violated. In such event a true cause-in-fact problem would have been presented (i.e., if plaintiff had *not* been so deterred from attempting escape, would he probably have succeeded in reaching the ladder?). But as the matter stands, the case presents a situation where the plaintiff did not suffer damage arising from any risk within the contemplation of the statutory provision regulating the structural condition of fire exits—the only provision violated by the defendant. The cause-in-fact approach adopted by the decision did lead the court unerringly to the proper conclusion, and the opinion by Tate, J., is truly an excellent one within the ambit chosen by the court. But the writer of the opinion, having chosen a causation approach, felt obliged to engage in a lengthy discussion of the burden of proof with reference to the issue of cause, when, as I see it, there was no cause issue involved. A court's choice of issue is frequently dictated by the pleadings on appeal, and plaintiff's counsel in *Lee v. Carwile* had ingeniously posed the problem in terms of causation, since this afforded the best line of argument from the victim's standpoint.

DUTY OF OCCUPIER OF LAND

Duty of Occupiers to Business Guests

In a previous installment of this Symposium the writer pointed to the difficulty encountered by courts in seeking to determine when a customer injured on business premises should be regarded as guilty of contributory negligence or as having assumed the risk of accident.³³ At that time it was suggested that most of the difficulty stems from differences of opinion among the judges concerning the extent of the duty owed by the proprietor to his customers. If the full measure of the proprietor's obligation is only to obviate those dangers that even an alert customer could not discover for himself, then it is to be expected that the alleged heedlessness of the customer will always serve to bar his recovery. If, on the other hand, more is demanded of the proprietor by law, and if he can be required

33. Malone, *The Work of the Louisiana Appellate Courts for the 1963-1964 Term — Torts*, 25 LA. L. REV. 334, 337 (1965).

to anticipate that his customers will expect the place to be reasonably safe and that they will correspondingly relax the precautions taken for their own protection, then the proprietor must take into account a certain amount of expectable heedlessness of customers if he is to meet the standard of care required of him. Whenever the duty of the proprietor is so viewed the inadvertence of the customer will frequently be minimized or disregarded.³⁴

This difference in the basic approaches to the proprietor's duty is brought out with unusual clarity in a comparison of the dissenting opinions of Judges Tate and Culpepper, on the one hand, and of Judge Hood, on the other, in the recent decision *Miller v. New Amsterdam Cas.*³⁵ Plaintiff, a customer of the House of Fashion, a beauty shop operated by the defendant, slipped and fell in a most unfashionable manner upon ice that covered the private walkway leading to the premises. The majority opinion faced the problem as one relevant to the proprietor's duty. The opinion stated that a proprietor owes no duty to remedy conditions which were observed by the customer or which could have been observed by her if she had been reasonably alert. In view of the fact that Mrs. Miller saw the ice and encountered it, the defendant (who also knew of the condition) owed her no duty to correct it, irrespective of how easily or how inexpensively this might have been done. Since the defendant breached no legal duty owed plaintiff, the issue of contributory negligence was pretermitted and no decision on that matter was necessary.

The dissenting opinions expressed disagreement with the majority as to the extent of the duty owed the patron. They emphasized that defendant, by maintaining the doors of its establishment open, thereby invited the public to encounter the dangerous icy condition. By so doing, the proprietor came under a duty to use reasonable care to make the premises safe. In dealing with the remaining issue of contributory negligence or assumption of risk, the dissenting opinions observed that although plaintiff knew the walkway was slippery, she "certainly did not think that if she attempted to walk across it she would suffer serious and permanently disabling injuries."³⁶

34. *Ibid.*

35. 164 So. 2d 676 (La. App. 3d Cir. 1964).

36. *Id.* at 685.

The difference in the approaches of the majority and the dissenting opinions is interesting. Since the majority opinion limited the duty of the proprietor to the removal of hidden defects that could not be reasonably discovered by the patron, the writer found it unnecessary to discuss the possible contributory negligence or assumed risk of the patron. But the dissenting opinions, after acknowledging a broader duty, were still obliged to dispose of the alleged assumption of risk on the part of the victim. Quite obviously this leads to an anomalous predicament, for once it is acknowledged that the proprietor is under a duty to anticipate that a patron may knowingly encounter the danger and that he has a corresponding duty to remove even obvious perils, it is difficult to claim that the very knowledge of the patron which the proprietor was obliged to guard against operates to deprive the victim of recovery on the ground that he has assumed the risk or is guilty of contributory negligence.

The anomaly described above continues to give trouble everywhere, for the law is definitely in a state of transition with respect to the proprietor-customer relationship. The original draft of the Restatement of Torts adopted the same position as the majority opinion in the instant case—there is no duty to repair obviously dangerous conditions.³⁷ Thirty years later, however, the course of decision forced a change of position by the American Law Institute. A new section was added to the Restatement of Torts Second, which provides:

“Sec. 343A. A possessor of land is not liable to his invitees [business guests] for physical harms caused by any activity or condition on the land whose danger is known or obvious to them, *unless the possessor should anticipate the harm despite such knowledge or obviousness.*” (Emphasis added.)

It was pointed out earlier³⁸ that in most of the litigated cases where the courts or juries have found that the patron was contributorily negligent or that he assumed the risk, it will be found that there was in actuality no appreciable fault on the part of the proprietor and the claim could have been readily dismissed on that ground alone. Another and more recent ex-

37. RESTATEMENT, TORTS, § 343(c) (1931).

38. Malone, *The Work of the Louisiana Appellate Courts for the 1963-1964 Term — Torts*, 25 LA. L. REV. 334, 337 (1965).

ample of this type of decision is afforded in *Colclough v. Orleans Parish Schools*.³⁹ The facts in that case indicated that during the course of football practice on the field of a high school the team was engaged in scrimmage while the plaintiff and several others were spectators and congregated around an area that was about ten to twelve feet from what would be one of the side boundary lines of the field. During the course of scrimmage one of the players ran into the plaintiff and injured him. It seems obvious to the writer that this was not a public game and it could not be expected that special precautions would be taken for the twenty-five or so spectators who watched the proceeding. The decision, then, is clearly correct in its result. There was no negligence. The court's conclusion, however, was justified entirely in terms of the contributory negligence or assumed risk of the patron. It is doubtful that a court would resort to this rationale if the injury had taken place during a game to which the public was invited as paying spectators and if actionable negligence with reference to the provision of spectator accommodations or safeguards were properly chargeable to the defendant.

*Duty of Proprietor of Business Premises to Control
Conduct of Patrons or Third Parties*

The proprietor of a business establishment owes to his patrons a duty of care, not only with respect to the physical condition of his premises, but likewise to protect them against the expectable misconduct of other patrons or of third persons whom he has permitted to be on the premises.⁴⁰ This duty is a concomitant of the proprietor's power to deny admission to those persons whose expectable misconduct would constitute a threat to the safety of other patrons or invitees and of his power to eject any patron whose conduct has become obviously dangerous since his admission to the premises. Particularly is this duty clear where the proprietor has so arranged his premises as to increase the risk that one patron's carelessness or misconduct may injure another, or where the proprietor tolerates dangerous objects on the premises which could be readily utilized by a thoughtless or mischievous patron so as to inflict injury.⁴¹ Thus

39. 166 So.2d 647 (La. App. 4th Cir. 1964).

40. RESTATEMENT, TORTS § 344 (2d ed. 1965); PROSSER, TORTS 315, 402 (3d ed. 1964).

41. PROSSER, TORTS 315, 402 (3d ed. 1964). See also RESTATEMENT, TORTS

the operator of a barroom who allowed his inebriated patrons access to a pistol loaded with blank cartridges was held liable for an injury that resulted from a prank played by one customer upon another through the use of this weapon.⁴² Similarly, in another case the court suggested that a hotel whose employees passively stood by while one drunken guest assaulted another could be subjected to liability for the resulting damage.⁴³ On the other hand, the proprietor of a bowling alley escaped liability for an injury suffered by one patron when another patron inadvertently struck her in the abdomen while practicing a backswing with a bowlingball.⁴⁴ The alleged negligence of the proprietor was the defective arrangement of the premises so that the refreshment bar (where the plaintiff was seated) was in close proximity to the rack in which bowling balls were stored. The spare facts set forth in the opinion suggest that there was no serious defect in the layout of the alley and its facilities; hence the court's denial of liability could probably be justified on the facts. The opinion, however, contains disturbing language to the effect that "a proprietor cannot anticipate the negligence of his patrons. He furthermore cannot be held for the negligence of another without some special relationship."⁴⁵

Duty—Attractive Nuisance

The so-called "attractive nuisance" doctrine at one time played an important role as a device to assist courts in ridding the law of the ancient no-duty-toward-trespassers restriction in situations involving trespassing children. However, in recent years it has largely outworn its usefulness and can prove to be an actual handicap to the effective administration of justice. Through the use of attractive nuisance language during the first decade of this century it became possible to announce that a limited duty of care is owed to young child trespassers with respect to dangers on land that could be obviated without serious inconvenience or heavy cost to the owner. Now that the duty has become recognized and it is acknowledged that

§ 343 (2d ed. 1965) which should be considered in connection with §§ 302A, 302B.

42. *Cavalier v. American Employers' Ins. Co.*, 170 So.2d 713 (La. App. 1st Cir. 1964).

43. *Cf. Stewart v. Roosevelt Hotel*, 190 So.2d 681 (La. App. 4th Cir. 1965).

44. *Alfortish v. Massachusetts Bonding & Ins. Co.*, 171 So.2d 705 (La. App. 4th Cir. 1965).

45. *Id.* at 707.

a landowner can be regarded as negligent under such circumstances, the desirability of retaining a special "nuisance" doctrine is highly doubtful.⁴⁶ But attractive nuisance language persisted in the decisions. As a result the opinions became replete with increasingly elaborate discussions as to whether this or that defect qualifies as an "attractive nuisance."⁴⁷ In the overwhelming majority of the cases in which courts explained that the object inflicting the harm was not an "attractive nuisance," recovery could have been denied simply and effectively through the observation that there was no adequate showing of negligence on the part of the landowner. The continued emphasis upon attractive nuisance is more than a matter of confusing terminology. Its persistence in opinions conveys the impression that "attractive nuisance" is to be regarded as a unique *type* of liability, and that whenever the offending dangerous object meets the nuisance qualification liability must follow as a matter of course without reference to the presence or absence of negligence on the part of the landowner. The recent Louisiana decision, *Martin v. Sessum Serv. Corp.*⁴⁸ is an example. The facts appear to be very simple: a five year old child crawled into a residence that was still under construction by defendant and fell from a window. The writer gathers from the sparse statement of facts that the accident happened after working hours and at a time when no adult was present. There was no suggestion as to what defendant should have done to minimize a danger of this kind. Unless the standard of reasonable care for landowners is to be regarded as imposing a duty on builders to maintain a watchman or to fence off all construction work in residential neighborhoods, it is difficult to find any suggestion of negligence upon which the plaintiff's claim could be predicated. Thus the court's ultimate conclusion that there was no liability appears entirely appropriate. But

46. Perhaps the most widely approved section of the *RESTATEMENT, TORTS* (1938) is § 334, which deals with the duty of an occupier of land toward trespassing children. The term "attractive nuisance" is not used. Instead, liability is imposed through reference to four factors or considerations listed in the section. Among many recent decisions repudiating the language of attractive nuisance are *Kahn v. James Burton Co.*, 5 Ill. 2d 614, 126 N.E.2d 836 (1955); *King v. Lennen*, 53 Cal. 2d 340, 348 P.2d 98, 1 Cal. Rptr. 665 (1959). Writers almost universally espouse the *Restatement* approach: *Prosser, Torts* § 59 (3d ed. 1964); 2 *HARPER & JAMES, TORTS* § 275, at 1450 (1956).

47. Convincing evidence of the useless complexities attendant upon the effort to classify objects on land as being, or not being, "attractive nuisances" is afforded by a casual examination of 1 A.L.R. *Word Index to Annotations* 179-82 (1937) in which four double-columned pages are devoted to a bare listing of such objects as they are treated in this single set of books.

48. 174 So. 2d 180 (La. App. 4th Cir. 1965).

the opinion does not contain a single reference to the presence or absence of negligence. It is devoted entirely to the abstract question as to whether a residence under construction is to be regarded as an "attractive nuisance." Indeed, the opinion observed, "the attractive nuisance doctrine is in derogation of the ordinary rules of negligence and, therefore, should be applied with great caution."⁴⁹ As the writer understands the matter, the opposite is true. The doctrine merely serves to bring into operation the ordinary principles of reasonable care in one type of trespasser situation where, apart from the doctrine, there would be no recognized duty of care toward children who are on the land of another without permission. In any view the existence or non-existence of negligence must remain the principal issue.

DUTY OF AGENT TO THIRD PARTIES

The tort liability of an agent for failure (or omission) to perform duties required by his contract with his principal resulting in injury to a third party is apparently not as clearly settled in Louisiana as it appeared to be a few years ago. Prior to 1958 the jurisprudence was made up largely of inconclusive observations that stemmed largely from an 1882 decision, *Delaney v. Rochereau*.⁵⁰ In the *Delaney* case the Supreme Court restricted the tort liability of an agent to misfeasance and malfeasance, and denied liability for negligent nonfeasance.

This decision and similar announcements by courts elsewhere have been severely criticized by writers.⁵¹ Later decisions either abandoned the distinction between misfeasance and nonfeasance, or they expanded the term, misfeasance, so as to embrace negligent omissions as well as acts of affirmative misconduct. The Restatement of Agency Second imposes on the agent a duty of care toward third persons whenever his failure to act without negligence would serve to deprive the third person of some protection owed the latter by the principal.⁵² In 1958 this position was clearly adopted in a well-reasoned opinion by the Louisiana Court of Appeals for the First Circuit in *Adams v.*

49. *Id.* at 182.

50. 34 La. Ann. 1123, 44 Am. Rep. 456 (1882).

51. The most persuasive and devastating is Seavey, *Liability of an Agent in Tort*, which first appeared in 1916 in 1 So. L.Q. 16 (1916), republished in SEAVEY, *STUDIES IN AGENCY* 1 (1949).

52. RESTATEMENT, AGENCY § 354 (2d ed. 1958). See particularly comment a.

*Fidelity & Cas. Co.*⁵³ The Supreme Court refused a writ of certiorari in *Adams'* case.⁵⁴

In considering the *Adams* decision it should be borne in mind that the agent should not be held responsible to a third person for his mere failure to perform an affirmative duty toward his principal unless (a) the principal owed a duty of care toward the third person, and (b) this same duty was delegated to the agent, who undertook its performance. When both these conditions have been met it will be found that the agent, by failing to perform his duty, has deprived the third person of the protection to which the latter was entitled and which, presumably, he would have received from the principal if the agent had not undertaken its performance. Under these circumstances the failure of the agent serves as a positive interference with the third person's right to reasonable protection by the principal, and his negligence becomes something more than nonfeasance.

But the converse is also true. When the principal is not encumbered with any duty toward the third person or, even if he is so encumbered, he has not delegated its performance to the agent, there is no reason why mere nonfeasance by the agent should result in his liability.⁵⁵ This reasoning led the Supreme Court in *Day v. National U. S. Radiator Corp.*⁵⁶ to deny recovery against an architect for the death of a worker hired by a subcontractor, who was killed through the negligence of the latter in the operative details of installing a boiler in a building under construction. The principal (owner) owed no duty to supervise the methods of operation adopted by the subcontractor, and even had he owed such a duty, the architect was not hired for the purpose of protecting the safety of workers.

A similar situation was recently presented to the Court of Appeal for the Fourth Circuit in *Daigle v. Cobb*.⁵⁷ The United States entered into a contract for various support services with Mason-Rust. Included was the provision of a chemical disposal well. This work was subcontracted to Dow Industrial Service who, in turn, subcontracted all or part of it to Anson Incorpora-

53. 107 So. 2d 496 (La. App. 1st Cir. 1958).

54. *Ibid.*

55. See note 52 *supra*. Comment, 21 LA. L. REV. 849 (1961).

56. 241 La. 288, 128 So. 2d 660 (1961).

57. 175 So. 2d 392 (La. App. 4th Cir. 1965).

ted, plaintiff's employer. The plaintiff was injured in the course of his employment when four hundred pounds of pipe became disconnected from the rig and fell upon him. The injury was apparently due to carelessness of the plaintiff's own fellow workers or to a failure by his own employer (the subcontractor) to provide a safety chain. Plaintiff, being barred from recovery for negligence against any of the contractors involved, due to the exclusive remedy feature of the workmen's compensation statute,⁵⁸ instituted suit against Cobb, the general manager of Mason-Rust, the principal contractor. The facts suggest that Cobb's duties may have been merely to coordinate the work of the subcontractors and to insure that specifications in the contract with the government were followed. If so, the action of the court in dismissing the claim on a motion for summary judgment was clearly correct. The case appears to be analogous to *Day's* case in that Cobb's employer (the principal contractor) was under no duty to supervise the methods of operation of its subcontractors or to protect the latter's employees.

The court, however, chose to base its conclusion on the broad proposition that an agent cannot be made liable to a third person for mere nonfeasance of the agent in performing his duty to his principal.⁵⁹ It is difficult to avoid the conclusion that the Orleans court by so doing placed itself in opposition to the First Circuit with respect to the tort liability of an agent toward third persons and that it has espoused a proposition rejected in most of the later American decisions.

TRAFFIC AND TRANSPORTATION

The liability of a municipality for damages sustained in traffic by reason of a defective traffic signal was discussed in the recent decision, *Vidrine v. General Fire & Cas. Co.*⁶⁰ The City of Ville Platte maintained a traffic signal at the intersection of LaSalle Street and Latour Street. That side of the light facing LaSalle Street was not in operating condition. The light, how-

58. LA. R.S. 23:1032 (1950).

59. *Daigle v. Cobb*, 175 So.392, 395 (La. App. 4th Cir. 1965). The concurring opinion of Barnette, J., *id.* at 397, particularly emphasizes that in the writer's opinion nothing short of "positive wrong" could subject an agent to liability to a third person. He distinguishes the *Adams* case, 107 So.2d 496 (La. App. 1st Cir. 1958) on the ground that the agent had gained knowledge of the danger and thereafter failed to remove it. This, Barnette, J., observes, is "very close to an act of positive wrong."

60. 168 So.2d 449 (La. App. 3d Cir. 1964). See also the companion case, *Ardoin v. General Fire & Cas. Co.*, 168 So.2d 455 (La. App. 3d Cir. 1964).

ever, was functioning as to the signal facing Latour Street. Mrs. Vidrine was proceeding down LaSalle Street and, finding the signals inoperative, assumed that they had been intentionally extinguished by the city for the time. She therefore concluded that LaSalle Street, in the absence of a signal, was entitled to the right of way, and she proceeded slowly across the intersection, without stopping. At the same time Mrs. Ardoin, approaching the intersection on Latour Street, saw the light as green and assumed that she could proceed into the intersection without stopping. The result was a collision. Suit was brought by both Mrs. Ardoin and Mrs. Vidrine against the liability insurer of the City of Ville Platte. Any question of municipal immunity was foreclosed by reason of the fact that the city had insured against liability, and its insurer is not allowed to assert governmental immunity of its insured as a defense. The court concluded that the light had been inoperative for several days and that the condition was due to the negligence of the city. The defendant argued that in Mrs. Ardoin's suit it could not be subjected to liability because the negligence of the city was passive and the later conduct of Mrs. Vidrine intervened and precluded liability on the part of the municipality. In answer to this the court first held that Mrs. Vidrine was guilty of contributory negligence which would bar her own recovery. It relied upon the recent Supreme Court decision, *Soprano v. State Farm Mut. Auto. Ins. Co.*⁶¹ In that case the Supreme Court had observed "a nonfunctioning four sided semaphore signal device at an intersection in plain view of an ordinary observant motorist imposes a duty of extreme caution on any motorist approaching or entering that intersection. To enter such an intersection without slowing down or stopping to ascertain whether the crossing can be negotiated in safety is imprudent and constitutes negligence in legal contemplation."⁶² The court in the instant case, however, refused to hold that Mrs. Vidrine's conduct in any way affected the liability of the city with respect to Mrs. Ardoin, in whose favor the light was operating and served as an invitation to proceed. The opinion properly relied upon the decision in *Dixie U-Drive-It Yourself System v. American Beverage Co.*⁶³ In this latter decision, which has been much discussed in Louisiana,⁶⁴ the court held that certain duties im-

61. 246 La. 524, 165 So. 2d 308 (1964).

62. *Id.* at 534, 165 So. 2d at 312.

63. 242 La. 471, 137 So. 2d 298 (1962).

64. Note, 23 La. L. Rev. 142 (1962).

posed upon defendants should be construed as embracing the risk that some other person might, at a later time, fail to adjust himself reasonably in the face of the peril created in violation of the duty. That doctrine properly applies here. The duty of the city to use reasonable care to maintain its traffic signals in operating condition contemplates the risk that some highway user, faced with the emergency created by the absence of lights, would fail to adjust properly to the situation. It is interesting to note that in most jurisdictions persons so situated as Mrs. Vidrine have been allowed recovery for accidents attributable to inoperative traffic signals.⁶⁵ It is particularly noteworthy that if the possibility of Mrs. Vidrine's incautious adjustment to the inoperative light is a risk to be borne by the city in a suit by Mrs. Ardoin, it can be effectively argued that the same should be true with reference to Mrs. Vidrine's claim.

CONTRIBUTION AND INDEMNITY BETWEEN JOINT TORTFEASORS

Effect of Settlement With One Wrongdoer

In *Harvey v. Travelers Ins. Co.*,⁶⁶ the court of appeal was called upon for the first time to determine the effect to be given a release executed in favor of one of two solidary tortfeasors upon the contribution right of the remaining tortfeasor. Plaintiff, a passenger in a car driven by one defendant, was injured when the car collided with a truck. The accident allegedly was attributable to the negligence of both the host driver and the operator of the truck. After institution of suit against the insurers of both drivers the plaintiff entered into a compromise agreement with the insurer of the host and released it, reserving all rights to proceed against the insurer of the other driver. Thereupon the host driver's insurer, upon motion, was dismissed from suit over the protest of the insurer of the truck driver. The latter claimed that he was entitled to insist that the settling defendant be retained in order that the truck driver's insurer be accorded his right to a judgment over for contribution of half the amount ultimately found to be due. The court of appeal affirmed the dismissal. It announced that the effect of the joint tortfeasor's contribution measure⁶⁷ was to place joint tortfeasors on precisely the same basis as other

65. See cases collected in Annot., 74 A.L.R.2d 242, 275 (1960).

66. 163 So. 2d 915 (La. App. 3d Cir. 1964).

67. LA. CIVIL CODE art. 2103 (1870), as amended, La. Acts. 1960, No. 30, § 1.

solidary obligors. Under this view, said the court, the effect of the release of the host's insurer was to deprive the insurer of the truck driver of the right to contribution to which he was originally entitled. By so denying the remaining solidary obligor of his normal claim for contribution, the victim (creditor) surrendered his right to recover anything above one-half of the total amount of the claim from the remaining obligor. Since this defendant thus gains in effect the benefit of contribution, he has no interest in the retention of the other defendant in this suit. Presumably no credit is allowed for the payment made in settlement.

The result described above seems to contemplate that the tort victim may be either overcompensated (as where the amount paid in settlement exceeds more than one-half of the sum ultimately found to be due) or he may be undercompensated (where the amount paid in settlement is less than one-half of the amount ultimately found to be due). It is also to be noted that the result above contemplates that the settlor who pays more than one-half of what will ultimately be shown to be due has no right to contribution against his former solidary obligor for any part of the excess. This may have the effect of discouraging a payment of any sum in settlement that represents a sizeable proportion of what the defendant anticipates he could be obliged to pay through litigation. Furthermore, in controversies involving more than one alleged wrongdoer, it is common practice to attempt settlement first with the party against whom there is the least likelihood that a recovery could be had. This tactic will be discouraged under the rule of the *Harvey* case, for the plaintiff, by accepting a minimal settlement with the doubtful party, will find that he has reduced by a full one-half the amount recoverable under his claim against the more likely loser.

In a later decision, *Stewart v. Roosevelt Hotel*,⁶⁸ the court of appeal held that the rule of the *Harvey* case, is not applicable where one tort defendant claims a right to indemnity against another defendant. Plaintiff, a patron of the Roosevelt Hotel, was, allegedly, assaulted and kicked by another patron who was intoxicated at the time. The alleged fault of the hotel was in failing to take any affirmative action to protect the plaintiff against the assault after the hotel was reasonably chargeable

68. 170 So. 2d 681 (La. App. 4th Cir. 1965).

with knowledge of the prospect of such an occurrence. Thereafter the victim executed a release of the guilty patron and his insurer. In his suit against the hotel the latter sought to bring in the patron and his insurer as parties so that in the event the Roosevelt Hotel were subjected to liability it could claim indemnity against the patron and his insurer. The court held that third party practice was available to bring in the patron and his insurer for purposes of indemnity. The hotel, chargeable only with "constructive" fault, should not be deprived of its right to cast the ultimate burden in full upon the active wrongdoer. In view of the fact that the right to contribution and the right to indemnity are both devices to prevent unjust enrichment, the disparity in treatment of the two with respect to a settlement by one defendant is difficult to appreciate.

LAST CLEAR CHANCE—CONTRIBUTION BETWEEN JOINT TORTFEASORS

In 1963 there occurred a collision on the Summerfield-Johnson City Highway that gave rise to two companion suits⁶⁹ involving serious and interesting questions on both negligence law and the recent Louisiana contribution statute.⁷⁰ Evans, who was driving with his mother and two nieces as passengers, undertook to make a left turn without proper attention to the risk of being struck by the defendant Thorpe's car which was approaching from the rear. Evans was thus clearly chargeable with negligence. The court, however, found that Thorpe's attempt to overtake Evans under the circumstances was also negligent. In Evans' suit to recover for his own personal injuries and for damage to his car the court allowed recovery on the ground that Thorpe had the last clear chance. The opinion contains an excellent concise statement of the last clear chance doctrine and observes that Evans' effort to make a turn to the left brought him into a position where he was within the opposite lane of traffic unaware of his exposure to danger from Thorpe's overtaking vehicle. At the time Evans was no exposed, Thorpe did see the situation and should have realized Evans' plight at a time when he could have changed his own course so as to avoid the collision.⁷¹

69. *Evans v. Thorpe*, 175 So.2d 418 (La. App. 2d Cir. 1965); *Evans v. Phoenix Ins. Co.*, 175 So.2d 425 (La. App. 2d Cir. 1965).

70. LA. CIVIL CODE art. 2103 (1870), as amended, La. Acts 1960, No. 30, § 1.

71. Another recent last chance decision reaching the same conclusion on similar facts is *Southall v. Graves*, 165 So.2d 57 (La. App. 2d Cir. 1964).

Although resort to the last clear chance doctrine enabled Evans to recover for his own injuries despite his contributory negligence, this did not relieve him of liability for the injuries suffered by his three passengers, who were without fault. The fact that Thorpe had the last chance did not prevent Evans' conduct from being a contributing cause of the injuries to his mother and his two nieces. For this reason, Evans and his liability insurer were cast as solidary obligors with respect to the passenger injuries. Thus we are led to the strange conclusion that Evans' carelessness, which was a cause both of his own injuries and of those of his passengers, did not operate to deprive him of recovery for his own loss, although the same misconduct rendered him liable for the harms suffered by the family.

Since Evans and Thorpe were solidarily liable for the passenger injuries, the judgment provided that either defendant who satisfied the claim was entitled to contribution from the other under Louisiana Civil Code article 2103 and articles 1111-1116, Louisiana Code of Civil Procedure. The net result is that Thorpe and his insurer must pay the entire cost of Evans' injuries, but they are encumbered with only half of the cost of the injuries suffered by the passengers, although all the damage accrued from precisely the same misconduct by each driver. This conclusion is the unavoidable consequence of the state of Louisiana law that recognizes contribution between joint tortfeasors but at the same time retains the doctrine of contributory negligence and its companion doctrine of last clear chance. An equally anomalous result would have followed if the court had concluded that Thorpe did *not* have the last clear chance. In this event Evans would have been obliged to shoulder the entire cost of his own injuries (since there would be no recovery against Thorpe), but he could oblige Thorpe to pay half the cost of the injuries to the passengers by demanding contribution.

The basic difficulty leading to this complicated picture arises from the absence in Louisiana of a comparative negligence statute that could operate in harness with the contribution measure. Both comparative negligence and contribution are but separate facets of the single principle that losses should be divided between wrongdoers whose faults contribute to a single injury. Contribution comes into play when the consequence of

joint wrongdoing is an injury to a third person, while comparative negligence applies where the consequence of the joint wrongdoing is an injury to one of the wrongdoers himself. Had Louisiana enjoyed the benefit of a comparative negligence statute,⁷² as well as a contribution measure, Evans would have recovered for only half of his own loss (since last clear chance doctrines should have no place where a scheme of comparative negligence prevails)⁷³ just as he was similarly obliged to pay only half the loss suffered by the blameless passengers (the present rule under the contribution statute).

SECURITY DEVICES

*Joseph Dainow**

SURETYSHIP

The contract of suretyship must be made in writing in order to have any existence even as between the parties.¹ However, instead of a secondary liability in the event of the debtor's default, another person may undertake a primary responsibility for the indebtedness, and this relationship can be established without any writing.

In *Star Sales Co. v. Arnoult*,² the defendant had undertaken responsibility for credit sales to Colonial Distributors. From its analysis of the facts, the court concluded that the running account on a credit basis was in essence with Colonial Distributors and that the defendant's position was intended by the parties to be one of secondary liability in the nature of a surety. Since there was no writing, there was no suretyship; and the case was dismissed. Actually, the plaintiff had expressly refused to open a credit account for Colonial Distributors and only agreed to open such an account in the name of the defendant. Nevertheless, the plaintiff knew that the purchases were being made for Colonial Distributors, and therefore the court treated the situation as if credit had been extended to Colonial Distribu-

72. See the discussion in Malone, *Comparative Negligence—Louisiana's Forgotten Heritage*, 6 LA. L. REV. 125 (1945); INS. L.J. 217 (1946).

73. See the discussion in PROSSER, TORTS § 66, at 449 (3d ed. 1954).

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1. LA. CIVIL CODE art. 2278 (1870).

2. 169 So.2d 178 (La. App. 4th Cir. 1964).